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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 18 2005
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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as a programming engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) provides, in pertinent part:

> A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

The petitioner holds a baccalaureate degree in civil engineering from the National University, Manila. The petitioner submitted an evaluation certifying the degree as equivalent to a baccalaureate degree from an accredited U.S. educational institution. The petitioner documented at least five years of progressive experience in the field. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the beneficiary works in an area of intrinsic merit, software engineering, and that the proposed benefits of his work, increased dredging efficiency at the largest dredging contractor in the United States with projects worldwide, would be national in scope. It remains, then, to determine whether the beneficiary will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

At the outset, we note that the beneficiary's experience in dredging and computer programming is not dispositive. It is not sufficient for the petitioner to simply to enumerate the alien's qualifications, since the labor certification process might reveal that an available U.S. worker has the qualifications a well. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221. Finally, training in advanced technology or unusual knowledge, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.*

Nor are we persuaded by assertions relating to the expiration of the petitioner's nonimmigrant status. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this beneficiary's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification sought. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate specific prior achievements that establish the alien's ability to benefit the national interest. *Id.* at 219, n. 6.

[redacted] the petitioner's Manager of Survey Engineering, explains that accurate positioning and dredge monitoring are vital to the petitioner's operations, whose projects can require daily expenditures of $25,000 to $120,000. Thus, "exposure project efficiency is at a premium." In the early 1990's, the Global Positioning System (GPS) and personal computers became important to hydrographics, hydrographic surveying and dredge positioning. The petitioner's proprietary dredging software, which allowed the petitioner to take advantage of GPS and personal computers, "was directly responsible for the ability of [the petitioner] to complete [projects in the Boston Harbor and San Juan Harbor] efficiently and with great savings in man-hours and money to the government of the United States." Mr. [redacted] concludes that the software "is a contributing reason why [the petitioner] is the leading and largest dredging contractor in the United States."

The beneficiary joined the petitioner in 1994, when the petitioner was utilizing software developed by Hewlett Packard. Beginning in Qatar and then Denmark, the beneficiary developed software for specific projects. Based on his demonstrated success on these projects, the petitioner brought the beneficiary to its corporate headquarters during its transition from Hewlett Packard's basic language software to a Windows environment. The beneficiary rewrote the petitioner's "navigation and positioning software for [their] trailing suction hopper dredge fleet and our clamshell dredge fleet." In addition, the beneficiary developed "navigation programs for [their] newly commissioned marine subaqueous drilling and blasting vessels." According to Mr. [redacted] the beneficiary continues to maintain, improve and develop software. All of the beneficiary's programs "have been designed to operate in real-time based on contemporaneous data received from GPS satellites." The beneficiary has also developed a program that can account for the pitch and role of the water.

As evidence of the significance of the above program, the petitioner submitted letters from senior level officials at three contractors addressed to the petitioner attesting to the superiority of the petitioner's software within the industry. Two letters acknowledge the beneficiary's development and design of these programs. We note that [redacted] Senior Blasting Consultant with Contract[redacted] attests to becoming acquainted with the beneficiary during the original installation of his software in San Juan. Thus, [redacted] does not appear to be relying on the representations of the petitioner in his statement.

In response to the director's request for additional evidence, the petitioner submitted three letters from independent experts evaluating the beneficiary's software. The petitioner explained that the software, designed for in-house use, had not been patented.

The first letter is from [redacted] Director of the Center for Dredging Studies at Texas A&M University and author of a textbook on ocean engineering. Dr. [redacted] states:

> I have reviewed and analyzed the [beneficiary's] contributions, seen a video presentation describing the proprietary software also provided by [the petitioner], and been given an opportunity to interview representatives of [the petitioner] with respect to that software and the role [the beneficiary] played in developing it. Based on the foregoing, as well as my own background in the field, in my opinion the processes developed by [the beneficiary] represent fundamental advances that establish [the beneficiary] as a leader in dredging operations software development.

[redacted] explains that he is a licensed professional engineer, a licensed professional land surveyor and an ACSM certified hydrographer who previously was responsible for the U.S. Army Corps of Engineers' surveying and mapping policies at the Corps' headquarters. Mr. [redacted] was particularly responsible for those policies "associated with the Corps' nationwide dredging mission," including "developing dredging survey policies and standards used by the Corps and its construction contractors." As a retired consultant to the Corps, Mr. [redacted] recently "rewrote the Corps' policy manual on hydrographic surveying." Mr. [redacted] asserts that he is familiar with the beneficiary's software and that his programs "represent a remarkable contribution without parallel by any other individual worldwide." He opines that he "cannot imagine how [the petitioner] would operate at the level it does without the services of [the beneficiary]."

The final letter is from [redacted] Chief Executive Officer of [redacted] and [redacted] who formerly designed and developed software for automated survey systems utilized by the Corps and several dredging contractors. Mr. [redacted] asserts that he observed the beneficiary's software during "project oversight" and can "attest that these programs are perhaps the best suited for dredge operations and among the best in the industry." Mr. [redacted] concludes that it is "doubtful that [the petitioner's] operations would be as efficient as they are now were it not for [the beneficiary's] software programs and his abilities to adapt them to new needs and the constant changes in technology."

The director concluded that the petitioner's claims, supported only by references whose knowledge is limited to the representations of the petitioner, are not persuasive evidence that the beneficiary is the individual responsible for the development of the petitioner's dredging software.

On appeal, counsel does not question the need for independent evidence regarding the significance of the beneficiary's accomplishments and notes the submission of letters from independent experts. Counsel asserts, however, that independent evidence is not required to support an employer's assertions regarding an employee's "authorship" of an achievement. The petitioner submits several affidavits from high-level executives at the petitioning company, including its president and chief executive officer, attesting to the beneficiary's role in developing and designing the company's dredging software.

We concur with counsel only insofar as letters from employers are acceptable evidence of the employee's responsibilities for that employer. We note that had the beneficiary authored published articles or patented an innovation, the most persuasive evidence of such accomplishments would be the first page of the published article or the patent.

The beneficiary is not performing the type of work where the results are published and, if influential, cited. Nor is he an inventor of innovations likely to be patented and, if significant, widely licensed. The independent references in this case appear to be renowned experts, two of whom appear to have experience with the

beneficiary's work during while performing oversight duties. While letters from independent experts who nevertheless are aware of the beneficiary are most persuasive, Dr [redacted] analysis is based on a much more detailed review of the beneficiary's work than a cursory glance at the accomplishments listed on the beneficiary's curriculum vitae. Dr. [redacted] claims to have not only reviewed the software, but to have personally viewed a video presentation the petitioner created to showcase the beneficiary's work and to have personally interviewed the petitioner's employees. Finally, the record includes letters from subcontractors who have become acquainted with the beneficiary while installing his software and affidavits from the most senior-level officials at the petitioning company.

In light of the above, we find that the petitioner has adequately established the beneficiary's role in developing the petitioner's software and that they continue to rely on him to improve existing software and develop new programs. Given the unique circumstances of the beneficiary's occupation, we find that the petitioner has sufficiently established that a waiver of the labor certification requirement for the beneficiary is in the national interest.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the dredging community recognizes the significance of this petitioner's research rather than simply the general *area* of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.